2013 IL App (2d) 120390-U
No. 2-12-0390
Order filed November 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-1210
ANDREW SPANIER,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The issue of (1) granting the State's motion *in limine* to admit evidence pursuant to the corroborative complaint doctrine is forfeited; (2) granting the State's motion *in limine* pertaining to testimony regarding prior bad acts is forfeited in part and lacks merit in part; (3) granting the State's motion *in limine* regarding Marcelina's manner of dress on the day of the incident lacks merit; (4) miscellaneous evidentiary rulings are forfeited; (5) denying defendant's motions for mistrial and a directed finding is forfeited; (6) eavesdrop/overhear rulings are forfeited in part and lack merit in part; (7) cumulative error is unavailing; and (8) proof beyond a reasonable doubt lacks merit.

¶ 2 After a jury trial, defendant, Andrew Spanier, was convicted of one count of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)). After denying defendant's motion for a new trial, the trial

court sentenced defendant to a term of nine years in prison on the aggravated criminal sexual assault conviction. Defendant now appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We first note that the statement of facts contained in defendant's brief is deficient. An appellant's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013). Defendant's citations to the record are sparse and almost exclusively to his own testimony; the statement of facts contains only two citations to the victim's trial testimony. Adherence to supreme court rules is mandatory, not optional. *People v. Ramos*, 339 Ill. App. 3d 891, 904 (2003). Defense counsel is admonished to more carefully follow supreme court rules in any future appeals.

¶ 5 In summary, defendant and Marcelina K. had sexual relations on October 9, 2009. Defendant hired Marcelina to clean a house, and she was to meet defendant and his niece at defendant's home first. Marcelina alleged that, as they walked throughout defendant's home while waiting for his niece to arrive, defendant threw her down on a bed and lay on top of her, eventually pulling down her pants and panties, forcibly performing cunnilingus and then having intercourse with her. Defendant described the relations as consensual, with him helping Marcelina get undressed before the oral sex and intercourse ensued. Marcelina later followed defendant to a gas station, where she met defendant's niece, Bonnie. Marcelina and Bonnie then spent over four hours cleaning the house.

¶ 6 Marcelina did not tell anyone what had happened until Sunday, October 11, when she telephoned a friend, Maria. On Monday, October 12, she went to her doctor and told her that she had been sexually assaulted. She also told her daughter, Katarzyna, that day. Katarzyna took

Marcelina to the Mount Prospect police department, but they were told that they had to report the crime in Algonquin, where the crime occurred. Katarzyna took Marcelina to the Algonquin police department on Tuesday, October 13.

¶ 7 On October 20, 2009, Algonquin police officers went to Marcelina's house to conduct an overhear of a telephone call from Marcelina to defendant. The conversation, in Polish, lasted about 10 minutes. A translated transcript was prepared and entered into evidence at the trial.

¶ 8 II. ANALYSIS

¶ 9 Defendant raises eight issues of alleged trial court error and, for the reasons stated below, we determine as follows: (1) granting the State's motion *in limine* to admit evidence pursuant to the corroborative complaint doctrine is forfeited; (2) granting the State's motion *in limine* pertaining to testimony regarding prior bad acts is forfeited in part and lacks merit in part; (3) granting the State's motion *in limine* regarding Marcelina's manner of dress on the day of the incident lacks merit; (4) miscellaneous evidentiary rulings are forfeited; (5) denying defendant's motions for mistrial and a directed finding is forfeited; (6) eavesdrop/overhear rulings are forfeited in part and lack merit in part; (7) cumulative error is unavailing; (8) proof beyond a reasonable doubt lacks merit.

¶ 10 A. Background Regarding Claims Involving Motions *in Limine*

¶ 11 Defendant first contends that the trial court ruled erroneously on a series of pre-trial motions *in limine*. A trial court's ruling on a motion *in limine* is an interlocutory order that is subject to the trial court's review any time prior to or during trial. *People v. Denson*, 2013 IL App (2d) 110652, ¶ 9. When a trial court addresses a pretrial motion *in limine* on the merits, its ruling is always subject to reconsideration during trial, as events at trial may still affect the trial court's understanding of the probative value of the evidence, the risk of unfair prejudice to the party opposing the evidence, or

the trustworthiness of the evidence. *Id*. We review the grant or denial of a motion *in limine* for an abuse of the trial court's discretion. *People v. Starks*, 2012 IL App (2d) 110273, ¶ 20.

¶ 12 1. First Claim of Error: Corroborative Complaint Doctrine

¶ 13 Defendant first claims that the trial court erred in granting the State's motion *in limine* number one to admit evidence pursuant to the corroborative complaint doctrine. In general, a witness's testimony cannot be supported or bolstered by establishing that the witness made similar statements out of court, although exceptions have been made for spontaneous declarations and, in sexual assault cases, where the victim makes a prompt complaint of the assault. *People v. Jones*, 273 Ill. App. 3d 377, 384-85 (1995). There is no fixed time limit within which the complaint must be made to qualify as "prompt"; however, it must have been made without any inconsistent or unexplained delay, and it must be voluntary and spontaneous, not the product of a series of questions. *Id*. at 385. Admissibility in this context includes only the fact that the complaint was made; neither the substance of the complaint nor the identity of the offender is admissible. *Id*.

¶ 14 Defendant complains that the trial court improperly allowed this hearsay testimony from three witnesses—Marcelina, her daughter Katarzyna, and Anna Kusmierczyk. The trial court initially reserved ruling on motion *in limine* number one "pending hearing the evidence during the course of the trial and whether the State lays an appropriate foundation or not."

¶ 15 Similar to his statement of facts, defendant's argument fails to include a single citation to actual trial testimony and fails to even address Marcelina's testimony, which would be the basis for determining whether Marcelina's complaint of the assault was prompt and free from inconsistent or unexplained delay. Defendant merely includes reference to the testimony of one defense witness (without citation) and general allegations as to what Marcelina did immediately after the assault.

Without such evidence, defendant has failed to provide a record upon which we can meaningfully review the merits of his claim.

¶ 16 The "Argument" section of an appellate brief is to include citation "to the pages of the record relied upon" and reference "to the pages of the record on appeal *** where evidence may be found." Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Defendant fails to include citation to pages of the record relied upon or to actual evidence from the trial, let alone the pages of the record where that evidence can be found. It is not this court's function or obligation to act as an advocate or search the record for error. *People v. Williams*, 385 Ill. App. 3d 359, 368 (2008). This issue is inadequately argued and is forfeited.

¶ 17 2. Second Claim of Error: Prior Bad Acts

¶ 18 Defendant next contends that the trial court erred in granting, in part, the State's motion *in limine* number two. In this motion, the State asked the court to permit testimony of Zofia Spanier, defendant's wife in 2004, regarding an uncharged 2004 incident of alleged sexual assault by defendant.[1] The State sought to admit the testimony pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2008)) and as other crimes evidence demonstrating "*modus operandi*, consciousness of guilt, knowledge, motive, absence of innocent state of mind and the presence of criminal intent." The trial court denied the motion as it related to section 115-7.3 of the Code but "would allow the State to call this witness in rebuttal on the issue of consent or absent [*sic*] of mistake."

[1]The State initially also sought permission to admit the testimony of Dorata Faldasz regarding another alleged incident of sexual assault but did not proceed on that request because it could not secure the service of subpoena on her.

¶ 19 The admissiblity of other-crime evidence is within the trial court's discretion, and we will not overturn such a decision absent a clear abuse of that discretion. *People v. Boyd*, 366 Ill. App. 3d 84, 91 (2006). Other-crime evidence is not admissible to demonstrate a defendant's bad character or his propensity to commit crime. *People v. Walston*, 386 Ill. App. 3d 598, 609-10 (2008). However, such evidence is admissible where it is relevant to prove *modus operandi*, intent, identity, motive, absence of mistake, or any purpose other than to show propensity to commit crime. *Id*. at 610. When other-crime evidence is offered, there must be some similarity between the crime charged and the other crime to ensure that it is not being used to establish criminal propensity. *Id*. The trial court must weigh the relevance of the evidence in establishing the purpose for which it is offered against the potential prejudice. *Id*. The policy behind the exclusion of such evidence, despite its admitted probative value, is the practical experience that disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice. *Id.* We will not disturb a trial court's decision to admit other crimes evidence unless the trial court abuses its discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 20 Defendant argues, *inter alia*, that the State failed to provide Zofia Spanier's address or indicate that it would call her to testify until three days before trial; thus, according to defendant, his rights to due process and a fair trial "free from surprise, unfairness, and the inability to adequately investigate and prepare" were violated. However, defendant did not raise such an objection in the trial court, nor did he raise it in his supplemental motion for a new trial. To preserve an issue for appellate review, a defendant must object at trial and raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Houston*, 407 Ill. App. 3d 1052, 1054 (2011). Since defendant did neither, this argument is forfeited on appeal.

¶ 21 Defendant also argues that the State's use of Zofia's testimony showed only "defendant's propensity to commit a sex offense and bad character." However, other-crime evidence is relevant to prove a defendant's criminal intent or lack of an innocent frame of mind when a defense of consent is raised. *People v. Johnson*, 406 Ill. App. 3d 805, 810 (2010); *Boyd*, 366 Ill. App. 3d at 91-92; *People v. Harris*, 297 Ill. App. 3d 1073, 1086 (1998). The State must identify similarities between the other crime and the crime charged to ensure that the other crimes evidence is not offered merely to show propensity. *People v. Luczak*, 306 Ill. App. 3d 319, 324 (1999).

¶ 22 Zofia testified that, on April 9, 2004, she went to bed alone. About two hours later, defendant came into the bedroom and pulled off her pajamas. Defendant told her that he wanted to have sex; even though Zofia said that she did not want to, defendant said that she had to do it because she was his wife. Defendant held her by the arms, got on top of her, and "by force" put his penis in her vagina.

¶ 23 We conclude that the two crimes were sufficiently similar to be relevant to prove criminal intent. Both Marcelina and Zofia testified that defendant forcefully grabbed and pulled off their clothing and lay on top of them, using his body to hold them down while forcing sexual acts. There are not a great number of similar facts, as in, for example, *Luczak*:

> "In this case, like *Johnson* and *Harris,* defendant's two crimes were remarkably similar. Both victims were walking when defendant offered them a ride; defendant drove each victim to a secluded alley in the same area of Chicago; defendant threatened both victims by saying he would throw them into the lake or river if they did not agree to have sex with him; defendant called both women 'a tease'; defendant wanted oral sex from both victims; and defendant assaulted the victims anally. Defendant spoke to both victims about

> his affiliation with the Latin Kings. Additionally, defendant attacked both victims in his vehicle; defendant made similar threats to each victim and called them similar names; and defendant drove them to the location that each victim was going after he attacked them." *Luczak*, 306 Ill. App. 3d at 325.

However, both crimes were similar in that the minimal facts that were involved were substantially the same: defendant wanted sex, he pulled off the victims' clothing, he got on top of them, pinned them down with his body weight, and he had sex. Because of the consistency of the alleged acts, we conclude that Zofia's testimony did not lead to confusion of issues, unfair surprise, or undue prejudice, as the *modus operandi* was consistently simplistic in both instances. See *Walston*, 386 Ill. App. 3d at 610. We find no abuse of discretion in allowing this testimony.

¶ 24 3. Third Claim of Error: Manner of Dress

¶ 25 Defendant's next claim of error involves motions *in limine* regarding the clothing worn by Marcelina on the day of the incident; Marcelina had worn a blouse, jeans, a push-up bra, and thong underwear. In its motion *in limine* number four, the State sought "an order barring the defense from eliciting testimony, arguing or insinuating that the victim's manner of dress is proof [*sic*] that she consented in this case." Specifically, in arguing its motion, the State asked "that the defense be barred from introducing evidence, testimony or argument regarding the specific nature of the bra and the nature of the underwear." In his motion, defendant argued that Marcelina's clothing "is relevant on issues of credibility, resistance, and consent," and sought an order permitting "testimony and other evidence regarding the complainant's clothing." At the hearing on the motions, defendant argued that "every aspect of the clothing" was admissible, as it went "toward the consent issue because damage to the clothing goes toward the issue of resistance and consent." The trial court

found that Marcelina's "manner of dress according to law is irrelevant" and granted the State's motion.

¶ 26 On appeal, defendant argues that Marcelina "testified that her pants were 'ripped' off her by the Defendant but the Defense was barred from eliciting any testimony regarding the condition of the clothing, which would have shown that the clothing was undamaged and not ripped, torn, etc." However, defendant does not cite to anywhere in the record where Marcelina testified that her pants were "ripped" off of her body. Defense counsel used the phrase "ripped your pants off" in a question during cross-examination, at which point the court sustained the State's objection that the question "misstates the testimony." Marcelina testified only that defendant pulled her pants off.

¶ 27 Further, defendant was *not* barred from eliciting any testimony regarding the condition of Marcelina's clothing. Before Marcelina's testimony resumed on the second day of trial, defense counsel told the trial court,

> "There was some testimony on direct with the victim about her clothes being pulled off, and I was going to ask her just about the condition of her clothes, whether or not they were ripped.
>
> And the reason I was going to do that is not anything to do with consensual but what was her—it goes to her credibility. Because he's going to—the Defendant is going to testify to something different.
>
> * * *
>
> So we're not talking about the manner of the dress. We're just talking about the condition of the clothes."

The court responded that what counsel was asking "is an appropriate area of cross-examination."

¶ 28 On cross-examination, defendant proceeded to ask Marcelina whether her pants ever ripped, and she answered that they did not. Defendant twice asked her whether any of her clothes ripped, and both times she responded that she did not remember. Defendant then attempted to show the jury Marcelina's pants and bra "to show they, in fact, had not been ripped." The court denied the request to publish the clothes to the jury.

¶ 29 In this court, defendant mischaracterizes Marcelina's testimony, his own ability to elicit testimony on cross-examination regarding whether Marcelina's clothes were ripped, and what the trial court prohibited him from doing *vis-a-viz Marcelina's* clothing. This contention is not well founded, and we find no error here.

¶ 30 B. Fourth Claim of Error: Miscellaneous Evidentiary Rulings

¶ 31 Defendant's next contention involves the trial court's barring of testimony during trial: (1) improperly limiting cross-examination of Marcelina and Algonquin police detective John Bucci about the "alleged fact" that Marcelina may have contacted a private attorney about the case; and (2) regarding conversations between Marcelina and defendant "before, during and after the sexual encounter" involving "state of mind" or "statement against interest." However, defendant has failed to cite to any portion of the record that contains the substance of what the prohibited testimony would have contained. When a trial court refuses to admit evidence, a formal offer of proof is needed to preserve the issue for appeal; failure to make an adequate offer of proof forfeits the issue on appeal. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 34; Ill. R. Evid. 103(a)(2) (eff. Jan. 1, 2011). These miscellaneous evidentiary rulings are also forfeited.

¶ 32 C. Fifth Claim of Error: Motions for Mistrial and Directed Finding

¶ 33 Defendant contends that the trial court improperly denied his motion for a mistrial and erred in denying his motion for a directed finding as to count 3 of the indictment, which alleged the crime of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)) in that defendant used force in placing his penis in Marcelina's vagina and, in doing so, caused bodily harm in the form of bruising to her arms and lower back. Defendant has failed to cite to the portions of the record involving the purported motions for mistrial and for a directed finding; the only citations to the record contained in this portion of defendant's brief have nothing to do with either a motion for mistrial or a motion for directed finding. It is not this court's function or obligation to act as an advocate or search the record for error. *Williams*, 385 Ill. App. 3d at 368. We determine that this claim is forfeited.

¶ 34 D. Sixth Claim of Error: Eavesdrop/Overhear Rulings

¶ 35 Defendant next contends that the trial court erred in various rulings regarding the State's use of eavesdrop/overhear evidence. We will not reverse a trial court's ruling on the admission of evidence unless it is an abuse of discretion; that is, unless it is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view of the trial court. *People v. Limon*, 405 Ill. App. 3d 770, 772 (2010).

¶ 36 Defendant raises arguments regarding trial court rulings that limited his questioning of Detective Bucci regarding the procurement of the eavesdrop order and the timing of defendant's arrest. Defendant cites to no authority in these arguments, failing even to cite to a standard of review. This court is entitled to have issues clearly defined with pertinent citations to authority and is not a repository into which the defendant may foist the burden of argument and research.

Williams, 385 Ill. App. 3d at 368. We consider these arguments insufficiently researched and argued and, therefore, forfeited.

¶ 37 Defendant next raises a series of arguments regarding use of a transcript of the eavesdrop recording, both during the presentation of evidence and in its closing arguments. Without any citation to authority, defendant argues that the State overemphasized the transcript of the overhear by reading portions of it to the jury during cross-examination of defendant and in closing argument. As these arguments are made without "citation of the authorities *** relied on" (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)), we find these arguments forfeited.

¶ 38 Defendant also argues that the State improperly published portions of the overhear transcript on an overhead projector during closing argument. According to defendant, the excerpts were "taken out of context in a piecemeal fashion, thereby misrepresenting the statements actually contained in the transcript." Defendant cites to two instances wherein the State argued that the transcript contained an admission to use of force and an attempt at a cover-up. First, we note that defendant did not object to either reference. As a defendant must both object at trial and raise the issue in his posttrial motion in order to preserve an issue for appeal (*Houston*, 407 Ill. App. 3d at 1054), this issue is forfeited. Further, defendant fails to direct this court's attention to a copy of the transcript or the slide used by the State so that we could compare the actual words of the transcript to the State's argument; we have no way to assess the accuracy of the State's argument. Any doubt arising from an incomplete record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 39 Defendant also argues that "highlighting portions of the translated transcripts to the exclusion of the entire context of the statements violated the Doctrine of Completeness." However, defendant

misunderstands the meaning of this doctrine. The completeness doctrine requires that "if one party introduces part of an utterance, the opposing party may introduce the remainder or so much thereof as is required to place the part originally offered in proper context so that a correct and true meaning is conveyed to the jury." *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 12. This doctrine applies to the admission of evidence, not to the highlighting of evidence during closing argument. We find no error here.

¶ 40 E. Seventh Claim of Error: Cumulative Error

¶ 41 Defendant next contends that the cumulative effect of the trial court's erroneous rulings denied him a fair trial. However, as we have found all of defendant's contentions either forfeited or without merit, this contention is unavailing.

¶ 42 F. Eighth Claim of Error: Proof Beyond a Reasonable Doubt

¶ 43 Finally, defendant contends that he was not proved guilty beyond a reasonable doubt. We review a claim of insufficient evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 9.

¶ 44 Curiously, in an issue concerning the quantum of evidence in the case, defendant never addresses the actual evidence presented in this case or even cites to the trial record. He further fails to specify what element or elements of the charges were not proven. We will not take the time to put forth in detail all the evidence that defendant failed to address in his brief. However, our review of the evidence in this case leads us to conclude that a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt, and we find no error here.

¶ 45 III. CONCLUSION

¶ 46 For these reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 47 Affirmed.